

**907 KAR 18:005. Reimbursement provisions and requirements regarding Veterans Affairs nursing facility services.**

RELATES TO: 42 U.S.C. 1396a(a)(13)(A), 42 U.S.C. 1396a(a)(30)(A), 42 C.F.R. Part 413, 42 C.F.R. 447.204

STATUTORY AUTHORITY: KRS 194A.030(2), 194A.050(1), 205.520(3)

NECESSITY, FUNCTION, AND CONFORMITY: The Cabinet for Health and Family Services, Department for Medicaid Services has responsibility to administer the Medicaid Program. KRS 205.520(3) authorizes the cabinet, by administrative regulation, to comply with any requirement that may be imposed, or opportunity presented, by federal law to qualify for federal Medicaid funds. This administrative regulation establishes the Department for Medicaid Services' reimbursement provisions and requirements regarding Veterans Affairs nursing facility services in Kentucky.

Section 1. Provider Participation. To be eligible to be reimbursed for services and drugs under this administrative regulation, a VA NF shall be currently:

- (1) Enrolled in the Kentucky Medicaid Program in accordance with 907 KAR 1:672;
- (2) Participating in the Kentucky Medicaid Program in accordance with 907 1:671;
- (3) Licensed by the Cabinet for Health and Family Services, Office of Inspector General as a nursing facility; and
- (4) Certified as a state veterans home by the United States Department of Veterans Affairs.

Section 2. General Requirements. To be reimbursable by the department, a service shall be:

- (1) Medically necessary;
- (2) Provided to a recipient who is eligible for nursing facility services in accordance with 907 KAR 1:022;
- (3) Provided in accordance with 907 KAR 1:022; and
- (4) Provided by a VA NF.

Section 3. Covered Services and Drugs. The following, if provided by a VA NF in accordance with this administrative regulation, shall be covered under this administrative regulation:

- (1) Nursing facility services;
- (2) Ancillary services;
- (3) Laboratory procedures or radiological services if ordered by:
  - (a) A physician;
  - (b) An advanced practice registered nurse if the laboratory test or radiological service is within the scope of the advance practice registered nurse's practice; or
  - (c) A physician assistant if the laboratory test or radiological service is:
    1. Authorized by the supervising physician; and
    2. Within the scope of the physician assistant's practice;
- (4) Psychological or psychiatric therapy; or
- (5) Drugs.

Section 4. Reimbursement. (1) The department shall reimburse a VA NF for services and drugs under this administrative regulation on a cost basis.

- (2)(a) The cost basis shall include reimbursing:
  1. A VA NF for services and drugs on an interim basis during a state fiscal year using a prospective payment rate; and

2. A final reimbursement to a VA NF for services and drugs for a state fiscal year:
  - a. Equal to the VA NF's Medicaid allowable cost for the state fiscal year; and
  - b. That results from a reconciliation of the:
    - (i) Interim prospective reimbursement paid by the department to the VA NF for the state fiscal year; and
    - (ii) Actual Medicaid allowable costs experienced by the VA NF for the state fiscal year as reflected on the cost report that has been desk reviewed and approved by the department for the state fiscal year.
- (b)1. Except as provided by subsection (3)(b) of this section, the prospective payment rate referenced in paragraph (a)1 of this subsection shall be:
  - a. Established using the most recently submitted cost report available to the department as of May 16 prior to the beginning of the state fiscal year; and
  - b. Trended and indexed to the midpoint of the state fiscal year.
2. For example, to set a prospective payment for a VA NF effective July 1, 2014, for the state fiscal year beginning July 1, 2014, the department shall:
  - a. Use the most recently submitted cost report available to the department as of May 16, 2014; and
  - b. Trend and index the prospective payment rate to December 31, 2014.
- (3)(a) A prospective payment rate for services and drugs shall:
  1. Be specific to the VA NF;
  2. Not be subject to retroactive adjustment except as specified in this section;
  3. Be determined by the department on a cost basis annually; and
  4. Except as established in paragraph (b) of this subsection, be based on a VA NF's Medicaid allowable costs.
- (b)1. If no cost report containing a full state fiscal year of cost data for a VA NF is available as of May 16, to set a prospective payment rate for the VA NF, the department shall:
  - a. If at least six (6) months of cost data is available, use pro forma cost data:
    - (i) Submitted to the department by the VA NF; and
    - (ii) Approved by the department; or
  - b. If less than six (6) months of cost data is available, establish a prospective payment rate equal to the statewide average prospective payment rate of existing VA NFs until the department receives pro forma cost data including at least six (6) months of cost data.
2. Pro forma cost data shall be trended and indexed in the same way as established in subsection (2)(b) of this section.
- (c) The department shall adjust a prospective payment rate during the state fiscal year if the prospective payment rate that was established appears likely to result in a substantial cost settlement that could be avoided by adjusting the prospective payment rate.
- (d)1. If the latest available cost report data has not been audited or desk-reviewed prior to rate setting for the universal year beginning July 1, a prospective rate based on a cost report which has not been audited or desk-reviewed shall be subject to adjustment when the audit or desk review is completed.
2. An unaudited cost report shall be subject to an adjustment to the audited amount after auditing has occurred.
- (e)1. If the department has made a separate rate adjustment as compensation to a VA NF for a minimum wage update, the department shall:
  - a. Not pay the VA NF twice for the same costs; and
  - b. Adjust downward the trending and indexing factors to the extent necessary to remove from the factors costs relating to the minimum wage updates already provided for by the separate rate adjustment.

2. If the trending and indexing factors include costs related to a minimum wage increase:
  - a. The department shall not make a separate rate adjustment; and
  - b. The minimum wage costs shall not be deleted from the trending and indexing factors.
- (4) The department shall consider an adjustment to a VA NF's prospective rate (subject to the upper payment limit) if:
  - (a) The VA NF's increased costs are attributable to:
    1. A governmentally imposed minimum wage increase, staffing ratio increase, or a level of service increase; and
    2. The increase was not included in the Global Insight Index;
  - (b) A new licensure requirement or new interpretation of an existing requirement by the appropriate governmental agency as issued in an administrative regulation results in changes that affect all VA NFs; or
  - (c) The VA NF experiences a governmentally-imposed displacement of residents.
- (5) The amount of any prospective payment rate adjustment resulting from a governmentally-imposed minimum wage increase or licensure requirement change or interpretation as cited in subsection (4) of this section shall not exceed the amount by which the cost increase resulting directly from the governmental action exceeds on an annualized basis the inflation allowance amount included in the prospective rate for the general cost area in which the increase occurs.
  - (a) For purposes of this determination, costs shall be classified as either:
    1. Salaries; or
    2. Other.
  - (b) The effective date of an interim rate adjustment shall be the first day of the month in which the adjustment is requested or in which the cost increase occurred, whichever is later.
- (6) A year-end adjustment of a prospective rate and a retroactive cost settlement adjustment shall be made if:
  - (a) An incorrect payment has been made due to a computational error (other than an omission of cost data) discovered in the cost basis or establishment of the prospective rate;
  - (b) An incorrect payment has been made due to a misrepresentation on the part of a facility (whether intentional or unintentional);
  - (c) A facility is sold and the funded depreciation account is not transferred to the purchaser;or
  - (d) The prospective rate has been set based on unaudited cost reports and the prospective rate is to be adjusted based on audited reports with the appropriate cost settlement made to adjust the unaudited prospective payment amounts to the correct audited prospective payment amounts.
- (7)(a) The department shall retroactively cost settle reimbursement for services and drugs.
  - (b) Retroactive settlement shall entail:
    1. Comparing interim prospective payments with the properly apportioned cost of Medicaid services and drugs rendered;
    2. A tentative cost report settlement based upon:
      - a. Eighty (80) percent of any amount due the facility after a preliminary review is performed;or
    - b. 100 percent settlement of any liability due the department; and
  3. A final cost report settlement after the allowed billing period has elapsed for the dates of service and drugs identified within the cost report.
- (c) To be considered final, a cost report shall have been reviewed and approved by the department.

Section 5. Allowable and Non-allowable Costs. (1) Nursing facility services' and drugs' costs shall be the direct costs associated with nursing facility services and drugs.

(2)(a) Except as provided in paragraph (d) of this subsection, interest expense used in setting a prospective rate shall be an allowable cost if:

1. Permitted pursuant to 42 C.F.R. 413.153; and

2. The interest expense:

a. Represents interest on:

(i) Long term debt existing at the time the provider enters the program; or

(ii) New long-term debt, if the proceeds are used to purchase fixed assets relating to the provision of the appropriate level of care; or

b. Is for working capital and operating needs that directly relate to providing patient care.

(b) The forms of indebtedness may include:

1. Notes, advances, and various types of receivable financing; or

2. Mortgages, bonds, and debentures if the principal is to be repaid over a period in excess of one (1) year.

(c) If a debt is subject to variable interest rates found in balloon-type financing, renegotiated interest rates shall be allowable.

(d) Interest on a principal amount used to purchase goodwill or other intangible assets shall not be considered an allowable cost.

(3)(a) The allowable cost for a service or good purchased by a VA NF from a related organization shall be the cost to the related organization unless it can be demonstrated that the related organization is equivalent to a second party supplier.

(b) Except as provided in paragraph (c) of this subsection, an organization shall be considered a related organization if an individual possesses five (5) percent or more of ownership or equity in the facility and the supplying business.

(c) An organization shall not be considered a related organization if fifty-one (51) percent or more of the supplier's business activity of the type carried on with the VA NF is transacted with persons and organizations other than the VA NF and its related organizations.

(4) The amount allowable for leasing costs shall not exceed the amount which would be allowable based on the computation of historical costs.

(5) A cost shall be allowable and eligible for reimbursement if the cost is:

(a) Reflective of the provider's actual expenses of providing a service; and

(b) Related to Medicaid patient care pursuant to 42 C.F.R. 413.9.

(6) The following costs shall be allowable:

(a) Costs to related organizations pursuant to 42 C.F.R. 413.17;

(b) Costs of educational activities pursuant to 42 C.F.R. 413.85;

(c) Research costs pursuant to 42 C.F.R. 413.90;

(d) Value of services of nonpaid workers pursuant to 42 C.F.R. 413.94;

(e) Purchase discounts and allowances pursuant to 42 C.F.R. 413.98;

(f) Refunds of expenses pursuant to 42 C.F.R. 413.98;

(g) Depreciation on buildings and equipment if a cost is:

1. Identifiable and recorded in the provider's accounting records;

2. Based on historical cost of the asset or, if donated, the fair market value; or

3. Prorated over the estimated useful life of the asset using the straight-line method, which is a method that depreciates the value of an asset evenly over the life of the asset;

(h) Interest on current and capital indebtedness;

(i) Professional costs of services of full-time or regular part-time employees not to exceed what a prudent buyer would pay for comparable services; or

(j) A provider tax on a VA NF.

(7) The following costs shall not be allowable:

(a) The value of services provided by nonpaid members of an organization if there is an agreement with the provider to furnish the services at no cost;

(b) Political contributions;

(c) Legal fees for unsuccessful lawsuits against the Cabinet for Health and Family Services;

(d) Travel and associated costs outside of the Commonwealth of Kentucky to conventions, meetings, assemblies, conferences, or any related activities that are not related to NF training or educational purposes; or

(e) Costs related to lobbying.

(8) For a bona fide change of ownership, the depreciation and interest costs shall be increased in valuation in accordance with 42 U.S.C. 1395x(v)(1)(O)(i).

(9)(a) Maximum allowable costs shall be the maximum amount which may be allowed to a VA NF as reasonable cost for the provision of a supply, drug, or service while complying with limitations expressed in related federal or state regulations.

(b) Costs shall be subject to allowable cost limits pursuant to 42 C.F.R. 413.106.

Section 6. Cost Report Requirements. (1)(a) A VA NF shall, no later than five (5) months following the end of a state fiscal year, submit to the department a cost report stating the VA NF's costs for the state fiscal year.

(b) The time limit stated in paragraph (a) of this subsection shall be extended at the specific request of the facility with the department's concurrence.

(2) If the VA NF experienced a new item or expansion representing a departure from current service levels and for which the VA NF requested prior approval by the department, the VA NF shall submit a supplement to the cost report to the department which:

(a) Describes the new item or expansion; and

(b) States the rationale for the new item or expansion.

(3)(a) Department approval or rejection of a projection of the cost of a new item or expansion shall be made on a prospective basis in the context that if a new item or an expansion and related costs are approved they shall be considered when actually incurred as an allowable cost.

(b) Rejection of an item or costs shall represent notice that the costs shall not be considered as part of the cost basis for reimbursement.

(c) Unless otherwise specified, approval shall relate to the substance and intent rather than the cost projection.

(d) If a request for prior approval of a projection or expansion is made, absence of a response by the department shall not be construed as approval of the item or expansion.

(4)(a) The department shall perform a desk review of each cost report to determine whether an audit is necessary and, if so, the scope of the audit.

(b) If the department determines that an audit is not necessary, the cost report shall be settled without an audit.

(c) A desk review or audit shall be used for purposes of verifying costs to be used in setting the prospective rate or for purposes of adjusting prospective rates which have been set based on unaudited data.

(d) An audit shall be conducted annually or at less frequent intervals.

(5)(a) A VA NF shall maintain and make available any records and data necessary to justify and document:

1. Costs to the VA NF; and

2. Services performed and drugs provided by the VA NF.

(b) The department shall have unlimited on-site access to all of a VA NF's fiscal and service

records for the purpose of:

1. Accounting;
2. Auditing;
3. Medical review;
4. Utilization control; or
5. Program planning.

Section 7. Preadmission Screening Resident Review (PASRR). (1) Prior to an admission of an individual to a VA NF, a VA NF shall conduct a level I PASRR in accordance with 907 KAR 1:755.

(2)(a) The department shall not reimburse a VA NF for a service delivered to an individual if the VA NF did not comply with the requirements of 907 KAR 1:755.

(b) Failure to comply with 907 KAR 1:755 may be grounds for termination of a VA NF's participation in the Medicaid Program.

Section 8. No Duplication of Service. The department shall not reimburse for a service provided by a VA NF to a recipient if the same service is provided at the same time to the recipient by another Medicaid program provider.

Section 9. Records Maintenance, Protection, and Security. (1)(a) A VA NF shall maintain a current health record for each recipient.

(b)1. A health record shall document each service provided to the recipient including the date of the service and the signature of the individual who provided the service.

2. The individual who provided the service shall date and sign the health record on the date that the individual provided the service.

(2)(a) A VA NF shall maintain a health record regarding a recipient for at least five (5) years from the date of the service.

(b) If the United States Department of Health and Human Services secretary requires a longer document retention period than the period referenced in paragraph (a) of this subsection, pursuant to 42 C.F.R. 431.17, the period established by the secretary shall be the required period.

(3) A VA NF shall comply with 45 C.F.R. Part 164.

Section 10. Medicaid Program Participation Compliance. (1) A VA NF shall comply with:

- (a) 907 KAR 1:671;
- (b) 907 KAR 1:672; and
- (c) All applicable state and federal laws.

(2)(a) If a VA NF receives any duplicate payment or overpayment from the department, regardless of reason, the VA NF shall return the payment to the department.

(b) Failure to return a payment to the department in accordance with paragraph (a) of this subsection may be:

1. Interpreted to be fraud or abuse; and
2. Prosecuted in accordance with applicable federal or state law.

Section 11. Third Party Liability. A VA NF shall comply with KRS 205.622.

Section 12. Use of Electronic Signatures. (1) The creation, transmission, storage, and other use of electronic signatures and documents shall comply with the requirements established in KRS 369.101 to 369.120.

- (2) A VA NF that chooses to use electronic signatures shall:
  - (a) Develop and implement a written security policy that shall:
    - 1. Be adhered to by each of the VA NF's employees, officers, agents, or contractors;
    - 2. Identify each electronic signature for which an individual has access; and
    - 3. Ensure that each electronic signature is created, transmitted, and stored in a secure fashion;
  - (b) Develop a consent form that shall:
    - 1. Be completed and executed by each individual using an electronic signature;
    - 2. Attest to the signature's authenticity; and
    - 3. Include a statement indicating that the individual has been notified of his or her responsibility in allowing the use of the electronic signature; and
  - (c) Provide the department, immediately upon request, with:
    - 1. A copy of the VA NF's electronic signature policy;
    - 2. The signed consent form; and
    - 3. The original filed signature.

Section 13. Auditing Authority. The department shall have the authority to audit any claim, medical record, or documentation associated with any claim or medical record.

Section 14. Federal Approval and Federal Financial Participation. The department's reimbursement and coverage of services and drugs pursuant to this administrative regulation shall be contingent upon:

- (1) Receipt of federal financial participation for the reimbursement and coverage; and
- (2) Centers for Medicare and Medicaid Services' approval for the reimbursement and coverage.

Section 15. Appeal Rights. A participating VA NF may appeal a department decision as to the application of this administrative regulation as it impacts the VA NF's reimbursement in accordance with 907 KAR 1:671. (40 Ky.R. 2660; 41 Ky.R. 44; eff. 8-1-2014.)